United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/affidavit of mlg

76-1506

To be argued by
ALVIN A. SCHALL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1506

B/S

UNITED STATES OF AMERICA,
Appellee,

—*against*—

JOHN QUINN and THOMAS FURY,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

John Quinn and Thomas Fury appeal from judgments of the United States District Court for the Eastern District of New York (Pratt, *J*) convicting them, following their pleas of guilty, of conspiring to transport stolen motor vehicles in interstate commerce from New York to Florida, in violation of T. 18 U.S.C. §371. Both appellants were sentenced to terms of three years imprisonment, appellant Fury's sentence to be served consecutively to a term of imprisonment previously imposed by the State of New York. Appellant Quinn is free on bail pending this appeal. Appellant Fury is in custody serving his state sentence.

The sole issue presented on appeal is whether the district court erred in denying the motions of appellants to suppress conversations intercepted in the course of a court-ordered wiretap on the telephone of appellant Fury.[1]

Statement of Facts

1. The Conspiracy

Evidence adduced at the time of the guilty pleas revealed the structure of the conspiracy. During June and July of 1974 appellant Fury arranged to have late model Cadillacs stolen in the New York area and transported to Florida for sale by Clark John[illegible] local auto auctions. Appellant Quinn's role in [illegible]me was to provide false registration papers and other related documents, so that the stolen cars could be safely driven to Florida and sold in the auctions. (See transcript of proceedings of July 27, 1976, pages 32, 35, 39).

A significant portion of the evidence against appellants consisted of conversations intercepted durin[illegible] a

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[1] Appellants' pleas of guilty were in satisfaction of the remaining charges pending against them in the indictment (75 Cr. 238); specifically, two substantive counts of interstate transportation of stolen motor vehicles, T. 18, U.S.C. §§ 2312 and 2. In pleading guilty, by agreement with the Government, appellants reserved the right to appeal the denial of the motion to suppress, a procedure approved by this Court. *United States* v. *Faruolo*, 506 F.2d 490, 491 n. 2 (2d Cir. 1974).

Also named as a co-defendant in each of the three counts of the indictment was Clark Johnston. Like appellants, Johnston pleaded guilty to the conspiracy charge and reserved the right to appeal. He was given a three year suspended sentence and a term of five years probation. Johnston, who is presently serving a sentence in the State of Florida, has not appealed his conviction in this case.

wiretap on the telephone of appellant Fury. This wiretap was the product of a previous wiretap in Nassau County, New York.

2. The Schnell Wiretap

On March 15, 1974, New York State Supreme Court Justice Frank X. Altimari issued an order for a wiretap on the telephone of one Myron Ronnie Schnell, at 15 Cedarwood Lane in Commack, New York (A. 64).[2] The order, which named Schnell as a target and which pertained to the crimes of grand larceny and criminal possession of stolen property, was issued on the application of Edward Margolin, the Acting District Attorney of Nassau County, New York (A. 68). The application was supported by the affidavit of Detective Robert Madonia of the Nassau County Police Department. The Madonia affidavit detailed the investigation of the Nassau County Police into Schnell's involvement into various auto thefts (A. 74-88).

The Schnell wiretap was in operation during the period from March 18 through April 16, 1974, with no extensions being sought (A. 7). On May 1, 1974, Justice Altimari signed an order sealing the tapes of conversations intercepted during the course of the wiretap (A. 11-12).

While the wiretap was in operation, the monitoring police officers overheard conversations to which appellant Fury was a party. On July 24, 1974, Fury, who was not named in the Schnell order, was served with written notice that his conversations had been intercepted. (A. 155). Appellant Quinn was not named in the eaves-

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[2] References preceded by the letter "A" are to pages of appellants' joint appendix.

dropping order, and no conversations to which he was a party were overheard during the Schnell wiretap.

3. The Fury Wiretap

On April 26, 1974, Queens County District Attorney Nicholas Ferraro applied for an eavesdropping warrant on the telephone of appellant Fury at 83-11 149th Avenue in Queens, New York (A. 91). In support of his application, the District Attorney submitted an affidavit of Detective Luis Gonzalez of the New York City Police Department. In his affidavit, Detective Gonzalez outlined his investigation into the activities of Fury and others with respect to the crimes of grand larceny and criminal possession of stolen property (A. 94-96). Also supporting the Ferraro application was an affidavit from Detective Madonia describing conversations of appellant Fury intercepted during the Schnell wiretap and setting forth transcripts of those conversations (A. 97-98). On April 26, 1974, New York State Supreme Court Justice Bernard Dubin issued an order for a wiretap on the Fury telephone, with appellant Fury being named as a target of the tap (A. 88).

Justice Dubin's order authorized interceptions for a period of 30 days from April 29 to May 28, 1974 (A. 89). Subsequently, two 30 day extensions were obtained, the wiretap eventually ending on July 2[illegible] 1974 (A. 99, 114, 135). On July 31, 1974, Supreme Court Justice Leonard Finz issued an order sealing the tapes of conversations overheard during the Fury wiretap (A. 139).[3]

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[3] On June 12, 1975, the order for the Fury tap was amended in a respect not relevant to the issues raised on this appeal (A. 107).

Both Quinn and Fury were overheard during the operation of the Fury wiretap. Appellant Fury was served with notice of the wiretap on April 1, 1975, after two orders were issued by Justice Dubin authorizing postponement of the service of notice (A. 124, 129). Appellant Quinn, who was not named in the eavesdropping order, was never formally served with notice of the wiretap. However, on February 20, 1976, the United States Attorney's Office sent a letter to Quinn's attorney advising him of the Fury wiretap and of the fact that conversations to which Quinn was a party were overheard during the wiretap (see attachments to memorandum of law in opposition to motion to suppress, item 22 in index to record on appeal).

ARGUMENT

POINT I

Appellant Quinn Lacks Standing To Contest Any Aspect Of The Schnell Wiretap; Appellant Fury Lacks Standing To Contest Minimization During The Schnell Wiretap.

In arguing that the district court erred in denying the motion to suppress, appellants attack both the Schnell and Fury wiretaps. With respect to the former, it is alleged that (i) Edward Margolin was not authorized to apply for the eavesdropping warrant; that (ii) there was a failure by the monitoring officers to minimize the interception of non-pertinent conversations; that (iii) recordings of conversations seized during the wiretap were not timely sealed; and that (iv) appellant Fury was not served with timely notice of the wiretap.

Having thus claimed that the Schnell order was invalidly issued and the resulting wiretap improperly exe-

cuted, appellants contend that the Fury wiretap, which was obtained on the basis of conversations overheard during the Schnell wiretap, should have been suppressed as being the tainted "fruit" of an illegal search. *Wong Sun* v. *United States*, 371 U.S. 484, 487-488 (1963). In addition, it is argued that the first extension order for the Fury tap, issued by Justice Dubin on May 28, 1974, was not supported by "present" probable cause and that there was untimely sealing and service of notice with respect to the recordings of conversations intercepted during the Fury wiretap.

Before addressing ourselves to these various claims, we point out as a preliminary matter that although both appellants have standing to attack the Fury wiretap, only appellant Fury can contest the validity of the Schnell order and sealing and the giving of notice under the Schnell wiretap. At the same time, however, Fury lacks standing to raise any minimization claim with respect to the Schnell wiretap. Consequently, although both appellants may challenge the Fury wiretap, only appellant Fury may base his arguments on any illegality with respect to the validity and execution of the Schnell wiretap. And even he may not do so on the grounds that there was a failure to minimize under the Schnell wiretap.

Under both New York State and federal law a person has standing to challenge the validity of a wiretap if any of his conversations were intercepted during the wiretap, or if he is a person against whom the wiretap was directed. See, N.Y. CPL §710.10, CPLR §4506, T. 18 U.S.C. §2510(11). Under this rule, both appellants have standing to challenge the Fury wiretap; and, in addition, except for minimization, appellant Fury can contest interceptions under the Schnell order. Quinn, however, lacks standing to challenge the Schnell wiretap. He was not named in the order for the Schnell wiretap, and no con-

versations to which he was a party were overheard during the wiretap.[4]

Thus, since appellant Fury is an "aggrieved person," T. 18 U.S.C. §2510(11), under both the Schnell and Fury wiretaps, he has standing to claim that the interceptions on his telephone were tainted by the Schnell wiretap, assuming *arguendo*, of course, that the Schnell wiretap was illegal. *Wong Sun* v. *United States*, *supra*, 371 U.S. at 487-488.

Appellant Quinn, however, is in a different situation. Not being an "aggrieved person" with respect to the Schnell wiretap, he could not have challenged directly evidence obtained from that wiretap. Consequently, he may not challenge the Schnell wiretap indirectly by seeking to suppress evidence from the Fury tap on the grounds that it is tainted by the prior Schnell tap. *United States* v. *Wright*, 524 F.2d 1100, 1102 (2d Cir. 1975); *United States* v. *Scasino*, 513 F.2d 47, 50-51 (5th Cir. 1975). Put most simply, since Quinn does not have "standing to contest the legality of the [Schnell wiretap], the information obtained from that [wiretap] was not illegally obtained as far as he is concerned." *United States* v. *Tortorello*, 533 F.2d 809, 815 (2d Cir.), *cert. denied*, — U.S. —, 45 U.S.L.W. 3300 (1976).

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[4] Since the warrants in this case were issued and executed under the New York eavesdropping statute, CPL § 700.05, *et seq.*, their validity must, in the first instance, be determined by New York law. *United States* v. *Rizzo*, 491 F.2d 215, 217 (2d Cir.), *cert. denied*, 416 U.S. 990 (1973). However, the New York statute is patterned after the federal wiretap statute, T. 18 U.S.C. § 2510 *et seq.*, and "[t]he provisions of CPL article 700 track, as they must, the language of the Federal Law." *People* v. *Sher*, 38 N.Y. 2d 600, 602, 381 N.Y.S. 2d 843, 845, 345 N.E. 2d 314, 317 (1976). Therefore, in arguing the issues raised in this appeal, reference will be made to both the New York and the federal wiretap statutes and cases decided thereunder.

Finally, it is equally clear that appellant Fury lacks standing to raise the issue of minimization during the Schnell wiretap. Squarely on point is the case of *United States* v. *Poeta*, 455 F.2d 117 (2d Cir. 1971), *cert. denied*, 406 U.S. 948 (1972). There, the defendant Poeta objected to the admission in evidence of conversations of his with his co-conspirator, Louis Stepenberg. The conversations were overheard by New York City police officers monitoring a state wiretap on Stepenberg's telephone. Poeta claimed that the failure to minimize the quantity of material intercepted on Stepenberg's telephone required the suppression of his (Poeta's) conversations on that telephone.

This Court rejected Poeta's claim. In so doing, it held that because "the tap was on Stepenberg's telephone, not Poeta's, Poeta lacks standing to contest any such invasion of Stepenberg's rights. E.g., *Alderman* v. *United States*, 394 U.S. 165." (455 F.2d at 122). The citation to *Alderman* in *United States* v. *Poeta*, is significant, because in *Alderman* the Supreme Court held that (i) the term "aggrieved person" in the federal wiretap statute is to be "construed in accordance with existing standing rules," 394 U.S. at 175, 176 n. 9; and that (ii) under existing standing rules only a person whose right to privacy was invaded, i.e., whose conversations were seized illegally or whose premises were subjected to illegal electronic surveillance, had standing to object to the admission of overheard conversations, 395 U.S. at 175, 176. See also *United States* v. *Hinton*, 543 F.2d 1002, 1011 n. 13 (2d Cir. 1976). Appellant Fury is thus barred from contesting minimization during the Schnell wiretap. He thus cannot challenge the tap on his phone on the basis of any argument predicated on a failure to minimize under the Schnell order.[5]

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[5] Leaving aside the fact that appellant Fury lacks standing, the present record in this case is hardly sufficient to enable this Court to pass on any minimization claim under the Schnell wiretap. No minimization hearing has been conducted, and the parties have not listened to any of the recordings of conversations intercepted during the Schnell wiretap. Cf. *United States* v. *Bynum*, 475 F.2d 832 (2d Cir. 1973).

POINT II

Edward Margolin Was Properly Authorized To Apply For The Schnell Wiretap.

Appellant Fury's first challenge to the Schnell wiretap is directed at the underlying application. Specifically, it is argued that Edward Margolin was not a proper "applicant" for an eavesdropping warrant within the meaning of the New York Criminal Procedure Law. We disagree.

Subdivision 2 of § 700.20 of the Criminal Procedure Law states that the application for an eavesdropping warrant must set forth the identity of the "applicant" and must contain a statement of the "applicant's" authority to make the application. "Applicant" is defined in subdivision 5 of Criminal Procedure Law § 700.05 to mean a "district attorney", or, if the district attorney is "absent or disabled . . . that person designated to act for him and perform his official function in and during his actual absence or disability." Finally, subdivision 4 of § 702 of the New York County Law provides that where there is more than one assistant district attorney, the district attorney is to file in the county clerk's office a designation of the order in which assistant district attorneys are to act and exercise the powers of the district attorney when he is absent or unable to perform the duties of his office.[6]

In the application submitted to Justice Altimari, Mr. Margolin identified himself and stated that he was the acting District Attorney of Nassau County. He also stated that William Cahn, then the District Attorney, was outside of the State and that he (Margolin) was acting under the authority of § 702 of the County Law (A. 68).

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[6] See also, T. 18 U.S.C. §§ 2516(2) and 2518(1)(a).

The application for the Schnell wiretap was made on March 14, 1974. On that date, there was on file in the Nassau County Clerk's office a memorandum dated June 10, 1970, signed by District Attorney Cahn, designating Edward Margolin and Henry P. DeVine (in that order) as "duly authorized deputies or emergency interim successors for the office of DISTRICT ATTORNEY." (A. 160). The memorandum recited that the designation was being made pursuant to Section 2216(3) of the County Government Law of Nassau County, providing for "the continuity of government in the event of an enemy attack or public disaster." (A. 160).

Also in effect in the district attorney's office at that time, but not on file with the county clerk, was an interdepartmental memorandum of designation signed by District Attorney Cahn. Pursuant to the Nassau County Government Law and Section 700.05 of the Criminal Procedure Law, the memorandum designated Edward Margolin, Robert Roberto, Jr. and Henry P. DeVine (in that order) as "duly authorized deputies or emergency interim successors" to the District Attorney (A. 162). The memorandum was dated April 9, 1971.[7]

Appellant Fury does not claim that the application for the Schnell order failed to state the identity of the applicant, or that it failed to contain a statement of Mr. Margolin's authority to make the application, as required by CPL § 700.20, subdivision 2; see, *People* v. *Fusco*, 75 Misc. 2d 981, 348 N.Y.S. 2d 858 (Nassau Cty. Ct.,

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[7] The portion of the memorandum referring to § 700.05 of the CPL was added by Assistant District Attorney DeVine after the New York eavesdropping statute was enacted. In addition, Assistant District Attorney Roberto was later dropped from the line of designation (see transcript of proceedings of July 21, 1976, pages 137-138).

1973). Rather, it is contended that the designation of authority under which Mr. Margolin acted did not comply with § 702 of the County Law because it only referred to circumstances arising from "enemy attack or public disaster." Hence, so the argument goes, Mr. Margolin was not a proper "applicant" within the meaning of subdivision 5 of § 700.05 of the CPL, at least in the situation where there was no "enemy attack or public disaster." Thus, citing *United States* v. *Giordano*, 416 U.S. 505 (1974), Fury asserts that the order for the Schnell wiretap was invalidly issued.

Appellant's reliance on *Giordano* is misplaced. There, the Supreme Court was called upon to determine the legality of a federal wiretap order which had been issued on the basis of an application authorized by the United States Attorney General's Executive Assistant. T. 18 U.S.C. § 2516(1) confers authority to authorize wiretap applications upon the "Attorney General, or any Assistant Attorney General specially designated by the Attorney General." Since the Executive Assistant was neither the Attorney General nor a specially designated Assistant Attorney General, the Court concluded that the wiretap application before it had been improperly authorized. It therefore affirmed the decision of the United States Court of Appeals for the Fourth Circuit suppressing evidence from conversations seized during the resulting wiretap. *United States* v. *Giordano*, *supra*, 416 U.S. at 508.

In reaching its decision, the Court reasoned that Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or a specially designated Assistant Attorney General. The Court also determined that "the provision for pre-application approval was intended to play a central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored." *Id.* at 528.

Giordano, then, simply stands for the proposition that if approval for an eavesdropping application is given by someone who lacks the power to do so, evidence from the resulting wiretap will be suppressed. However, no such situation is presented in the case at bar.

In his application for the Schnell order, Mr. Margolin identified himself and stated that he was the Acting District Attorney of Nassau County, pursuant to County Law § 702. At the same time, there was on file in the county clerk's office a designation signed by District Attorney Cahn clearly showing that Edward Margolin was the Assistant District Attorney first authorized to act in the absence of the District Attorney.

We recognize that the designation which was on file referred to provisions of the Nassau County Government Law and to succession in the event of "enemy attack or public disaster." It can hardly be argued, however, that the June 1970 memorandum did not also provide a designation of authority to cover instances of normal absence by the District Attorney. The Margolin application, by reciting that it was being made under the authority of § 702 of the County Law, itself indicates that the District Attorney's office intended that the designation which was on file cover normal absences. The inter-departmental memorandum of April 9, 1971, referring to § 700.05 of the CPL, supports the conclusion. Moreover, it defies both logic and common sense to argue, as appellant Fury does, that although Mr. Margolin could act in the extreme situation of "enemy attack or public disaster," he was without authority to do so when the District Attorney was simply ill or away from the office on vacation or business.

Accordingly, we believe that the facts fully support Judge Pratt's conclusion that the June 1970 designation

constituted "substantial compliance" with § 702 of the County Law (A. 141). Even more importantly, however, we submit that the court was also correct in its determination that the designation of Edward Margolin "was in fact made" (A. 142) and that Mr. Margolin was "the only person who could have acted in the absence of [District Attorney Cahn]." (A. 141). In short, it is clear that the application which was submitted in this case to Justice Altimari fully complied with the statutory requirement that it "identify an authorizing official who possessed statutory power to approve the making of the application" for the wiretap. *United States* v. *Chavez*, 416 U.S. 562, 574 (1974).[8]

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[8] We note only in passing appellant Fury's off-hand suggestion that subdivision 5 of CPL § 700.05 does not comport with the federal wiretap statute because it allegedly permits too broad a delegation of the authority to approve a wiretap application. Just such an argument was made and rejected in *People* v. *Fusco, supra*, 75 Misc. 2d 981, 348 N.Y.S. 2d 858. In addition, the fact is that the requirements of the New York statutory scheme clearly ensure, as Congress intended, that the authority to apply for wiretaps be with a "publicly responsible official subject to the political process," in this case the district attorney and those whom he designates. The New York statute also ensures that "[s]hould abuses occur, the lines of authority lead to an indentifiable person." S.Rep. No. 1097, 90th Cong. 2d Sess. (1968), 1968 U.S. Code Cong. and Admin. News 2185.

Furthermore, whatever the merits of such a claim, since he did not raise it below, Fury is barred from asserting it on appeal. See T. 18 U.S.C. § 2518(10), *United States* v. *Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976).

POINT III

Even Though There Was A Delay Of Fourteen Days In Sealing The Tapes From The Schnell Wiretap, Those Tapes Properly Served As Probable Cause For The Fury Wiretap.

Appellant Fury next argues that the fourteen day delay in sealing the tapes from the Schnell tap rendered the Schnell tap "illegal" and thus tainted the subsequent Fury order, which was obtained on the basis of conversations intercepted during the Schnell tap. We respectfully submit that this claim is without merit. Although the district court found that the delay in sealing the Schnell tapes was unexplained, we believe, as Judge Pratt ruled, that those tapes properly served as probable cause for the Fury tap (A. 142).

The relevant statutory provision is § 700.65 of the CPL which provides, in pertinent part:

> 1. Any law enforcement officer who, by any means authorized by this article, has obtained knowledge of the contents of any intercepted communication, or evidence derived therefrom, may disclose such contents to another law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
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> 2. Any law enforcement officer who, by any means authorized by this article, has obtained knowledge of the contents of any intercepted communication, or evidence derived therefrom, may use such contents to the extent such use is appropriate to the proper performance of his official duties.

> 3. Any person who has received, by any means authorized by this article, any information concerning a communication, or evidence derived therefrom, intercepted in accordance with the provisions of this article, may disclose the contents of that communication or such derivative evidence while giving testimony under oath in any criminal proceeding in any court or in any grand jury proceeding; provided, however, that the presence of the seal provided for by subdivision two of section 700.50, or a satisfactory explanation of the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any communication or evidence derived therefrom.
>
> 4. * * *

The language of § 700.65 makes it clear that the absence of the seal required by subdivision 2 of CPL § 700.50 does not bar the disclosure of the contents of wiretap tapes when that disclosure is for investigative purposes or for purposes of establishing probable cause for additional warrants. What is not allowed is the use or disclosure of the tapes before a grand jury or at a trial. And this is the logical approach. Otherwise, police officers operating an on-going wiretap would be unable to use the fruits of that tap simply because the tap had not yet ended and the tapes were thus not yet sealed.[9]

Indeed, our position is fully supported by the legislative history behind T. 18 U.S.C. §§ 2517 and 2518(8)(a), the provisions of the federal wiretap statute after which CPL §§ 700.50 and 700.65 are patterned. In commenting upon subsection 2 of § 2517, which is virtually

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[9] Subdivision 2 of CPL § 700.50 requires sealing only upon "the expiration of the period of an eavesdropping warrant."

identical to subdivision 2 of CPL § 700.65, Senate Report No. 1097 states that "[t]he proposed provision envisions use of the contents of intercepted communications, for example, to establish probable cause for arrest . . . [and] to establish probable cause to search . . ." S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), 1968 U.S. Code Cong. and Admin. News 2188. Similarly, a seal is only "intended to be a prerequisite for use or disclosure under section 2517(3)" ("while giving testimony under oath or affirmation in any criminal proceeding . . . or grand jury proceeding") *Id.* at 2194.[10]

Thus, even though the Government would have been barred by Judge Pratt's ruling from using the Schnell tapes against appellant Fury at trial, *United States* v. *Gigante*, 538 F.2d 502 (2d Cir. 1976), those tapes, which were lawfully obtained, were properly used in the Madonia affidavit (A. 97) to establish probable cause for the tap on the Fury telephone.[11]

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[10] See, *United States* v. *Johnson*, 539 F.2d 181 (D.C. Cir. 1976), where the Court of Appeals for the District of Columbia held that T.18 U.S.C. § 2517(5), which requires prior judicial approval for use of evidence from a wiretap which pertains to offenses other than those specified in the wiretap order, only applies when the other crimes evidence is to be offered "in testimony at a federal or state proceeding." 539 F.2d at 187. Use of the other crimes evidence without prior judicial approval is permitted, however, under T.18 U.S.C. § 2517(2) to provide probable cause for an additional wiretap.

In reaching its decision, the Court reasoned (539 F.2d at 187) that

> [t]he writers of the statute have apparently concluded that the balance of police efficiency with the need for safeguarding personal privacy calls for exclusion of the fruits of illegal seizures from admission at trial, but does not demand routine judicial review prior to that time, at every stage of an investigation.

[11] We regard the contrary dicta in *People* v. *Simmons*, 86 Misc. 2d 737, 743, 384 N.Y.S. 2d 367, 372 (Sup. Ct. N.Y. Cty. 1976), as incorrect in view of the language of CPL § 700.65 and T.18 U.S.C. § 2517 and the foregoing legislative history.

POINT IV

Failure To Timely Give Discretionary Notice To A Person That His Conversations Were Intercepted During A Wiretap Does Not Result In The Suppression Of Those Conversations.

Appellant Fury's final claim with respect to the Schnell wiretap is that the conversations intercepted thereunder should have been suppressed, because Fury was not served with notice of the wiretap until July 24, 1974. We submit that this argument has been foreclosed by the decision of the Supreme Court on January 18, 1977, in *United States* v. *Donovan*, 45 U.S.L.W. 4115.

Subdivision 3 of § 700.50 of the Criminal Procedure Law provides that within 90 days after the execution of an eavesdropping warrant notice of the wiretap must be served on the person named in the warrant and such other persons "as the [issuing] justice may determine in his discretion is in the interest of justice." T. 18 U.S.C. § 2518(8)(d), the provision in the federal statute after which subdivision 3 of CPL § 700.50 is patterned, is almost identical in its language.

In *Donovan*, upon completion of a federal wiretap, the government disclosed to the district court the identities of 39 of 41 persons who were not named in the wiretap warrant but whose conversations were intercepted during the tap and who were identified. The court was thus unable with respect to two of the overheard and identified parties to exercise its discretion under T. 18 U.S.C. § 2518(8)(d) to give notice to all persons who were unnamed but overheard. Because of this failure, the United States District Court for the Northern Dis-

trict of Ohio suppressed the wiretaps as against the two individuals who were not served with notice, and the Sixth Circuit affirmed.

Upon hearing the case after granting a writ of certiorari, the Supreme Court reversed. The Court concluded that the federal statute does require the government to furnish to the judge who issues the wiretap order the names of all persons who are not named in the order but whose conversations are overheard and who are identified. This is necessary so that the judge can exercise his discretionary notice powers under § 2518(8)(d). *United States* v. *Donovan, supra,* 45 U.S.L.W. at 4119-4120. After reaching this conclusion, however, the Court went on to hold that suppression of the tapes was not required simply because the authorities had failed to ensure that timely notice was served upon all those who were not named in the wiretap but whose conversations were overheard and who were identified. 45 U.S.L.W. at 4122. In so holding, the Court reasoned that

> [n]othing in the structure of the Act or [the] legislative history suggests that incriminating conversations are "unlawfully intercepted" whenever parties to those conversations do not receive discretionary inventory notice as a result of the Government's failure to inform the District Court of their identities. *Id.*[12]

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[12] In *People* v. *Tartt,* 71 Misc. 2d 955, 336 N.Y.S. 2d 919 (Sup. Ct. Erie Cty., 1972), the court held that failure to give post-termination notice of a wiretap under subdivision 3 of CPL 700.50 required the suppression of the fruits of the wiretap. In reaching its decision, the court looked to the language and legislative history of the federal statute and concluded that failure to give notice rendered the conversations which were seized "unlawfully intercepted" 71 Misc. 2d at 962, 336 N.Y.S. 2d at 926.

[Footnote continued on following page]

Appellant Fury, who was not named in the Nassau order and who was thus only entitled to discretionary notice, is plainly barred by *Donovan* from successfully asserting any notice claim under the Schnell wiretap. Moreover, Fury did receive notice of the wiretap on July 24, 1974, just seven days after the end of the 90 day period, and at no time has Fury asserted any prejudice on account of the fact that he did not learn of the Schnell tap until July 24th. See, *United States* v. *Donovan*, *supra*, 45 U.S.L.W. 4115 at 4122 n. 26; *United States* v. *Principie*, 531 F.2d 1132, 1141 (2d Cir. 1976).

It goes without saying, of course, that *Donovan* also bars appellant Quinn from successfully raising any claim of tardy notice under the Fury wiretap, since Quinn was not named in the eavesdropping order. In addition, as already noted above (Statement of Facts, *supra*, at page 5), the United States Attorney's office advised Quinn's attorney in February of 1976 of the wiretap, and Quinn has never alleged any prejudice resulting from untimely notice.[13]

The *Donovan* court squarely rejected this view when it concluded that the discretionary notice provision was not meant to play 'a central, or even functional, role' in the statutory scheme of Title III and when it stated that the fact that discretionary notice did not reach all persons who were overheard did not "in itself mean that the conversations were unlawfully intercepted." 45 U.S.L.W. at 4122.

[13] Also to be rejected, we submit, is Fury's contention that he failed to receive timely notice of the tap on his own phone and that, hence, conversations from that tap must, as against him, be suppressed.

In the first place, Fury apparently knew of the tap as early as July 18, 1974, before it had even ended. On that day, the monitoring officers overheard the following exchange between Fury and a caller:

[Footnote continued on following page]

Accordingly, for the foregoing reasons, we submit that conversations from the Schnell tap were lawfully obtained and that they properly served as probable cause for the Fury tap.

[caller]: So er, is the kid gonna do it or you want that guy up?
[Fury]: Don't talk.
[caller]: Oh.
[Fury]: No good.
[caller]: Oh, you got the word?
[Fury]: Yeah.

See footnote 3 on page 4 of memorandum of law in opposition to motion to suppress, item 22 in index to record on appeal.

In these circumstances, we fail to see how appellant Fury can assert that he did not have notice of the Queens wiretap. Compare, *United States* v. *Bynum*, 485 F.2d 490, 501 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974), *judgment reinstated*, 513 F.2d 533, *cert. denied*, 423 U.S. 952 (1975); *People* v. *Heuston*, 34 N.Y. 2d 116, 356 N.Y.S. 2d 272, 312 N.E. 2d 462 (1974), *cert. denied*, 421 U.S. 947 (1975).

Furthermore, actual notice aside, after two postponement orders, Fury was served with formal notice of the wiretap, on April 1, 1975, 15 months prior to the suppression hearing. Finally, at no time has Fury alleged or shown any prejudice resulting from the fact that he first received formal notice of the wiretap on April 1, 1975. *United States* v. *Donovan*, *supra*, 45 U.S.L.W. 4115; *United States* v. *Principie*, *supra*, 531 F.2d at 1141; *United States* v. *Rizzo*, 492 F.2d 443, 447 (2d Cir.), *cert. denied*, 417 U.S. 944 (1974); *United States* v. *Manfredi*, 483 F.2d 588, 601-602 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974).

POINT V

The Gonzalez Affidavit Established That Normal Investigative Techniques Had Been tried And Had Failed And That They Reasonably Appeared To Be Unlikely To Succeed If Tried Further.

Turning to the Fury wiretap, appellants contend that the eavesdropping order was improperly issued because the supporting affidavit of Detective Gonzalez allegedly did not comply with the requirements of subdivision 2(d) of § 700.20 of the Criminal Procedure Law. That section provides that an application for an eavesdropping warrant must contain

> [a] full and complete statement of facts establishing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence sought . . .[14]

In accordance with the statute, the Gonzalez affidavit contained the following statement (A. 95):

> Normal investigative techniques have been attempted in this case. Investigation herein commenced on April 2, 1974 and investigation was conducted on April 3, 4, 5, 9, 10, 11, 15, 16, 17, 19, 22, 23, and 24th. It is very difficult to "tail" the persons named herein because they are very careful and are constantly changing routes and acting in such a way as to locate surveillance vehicles. We have been able to ascertain that Thomas Fury goes often to an auto parts yard at

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[14] The equivalent, and almost identical, requirement is found in T. 18, U.S.C. § 2518(1)(c).

> E. 56th Street and Avenue D in Brooklyn, known as Bergen Auto Parts. This is a fenced in yard wherein the trailer that the "Goldbug" was placed is located. The "Goldbug" was an eavesdropping device placed by the Kings County District Attorney's Office Squad which allegedly obtained substantial information about criminal activities of Paul Vario and his associates. Therefore, the persons around this auto parts yard are very careful and very sensitive to Police surveillance.

Judge Pratt found that the Gonzalez affidavit sufficiently demonstrated that it would be fruitless to employ other investigative procedures in investigating Fury and his associates (A. 147). We believe this conclusion was correct.

At the outset, it is to be noted that the other investigative techniques requirement is to be tested in a "practical and common sense fashion." S. Rep. No. 1097, 1968 U.S. Code Cong. and Admin. News 2190, *United States* v. *Robertson*, 504 F.2d 289, 293 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975). The requirement is "simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12 (1974). It is not necessary that the government exhaust "every other imaginable method of investigation" before it turns to a wiretap, *United States* v. *Pacheco*, 489 F.2d 554, 565 (5th Cir.), *cert. denied*, 421 U.S. 909 (1974). And the courts have held that the burden upon the authorities of establishing the inutility of other investigative measures is a slight one; it need only be shown that under the circumstances it is reasonably likely that such techniques would not succeed. *United States* v. *Armocida*, 515 F.2d 29, 38

(3d Cir. 1975), *cert. denied*, 423 U.S. 858 (1976). We submit that when viewed reasonably and in a practical and common sense fashion, the Gonzalez affidavit fully meets the statutory requirements.

To begin with, the affidavit gives 13 specific dates on which the police unsuccessfully sought to surveil Fury and his associates. These efforts failed, however, because the subjects were "very careful and . . . constantly changing routes." More specifically, Detective Gonzalez focused on Fury and his practice of going to "Bergen Auto Parts" to conduct his illicit business. The affidavit further stated that Bergen Auto Parts was in the same fenced in yard where the famous "Guldbug" had been placed. This clearly gave additional definite and specific support for the contention that Fury and those around him were "very sensitive to Police surveillance."

In addition to the foregoing, however, Justice Dubin also had before him, from paragraph 8 of the Gonzalez affidavit (A. 96), the fact that Fury had already been arrested on five occasions for auto theft and other related crimes. It was entirely reasonable for Justice Dubin to further conclude that a man with such a background would be particularly wary of the police and their normal investigative measures.

In sum, we submit that the Gonzalez affidavit clearly made the showing with respect to other investigative measures which is required by CPL § 700.20(2)(d). Indeed, it is far more complete in this regard than the affidavit which was upheld by this Court in *United States* v. *Steinberg*, 525 F.2d 1126, 1130 (2d Cir. 1975), which only stated that Steinberg acted in a "covert manner" and that there was no known "undercover access to his supplier," coupled with a general statement as to the

wariness and caution of drug dealers in general. 525 F.2d at 1130. It also way surpasses the limited statements as to other investigative measures which were before the court and which were allowed in *People* v. *Fusco*, *supra*, 75 Misc. 2d 981, 992, 348 N.Y.S. 2d 858, 871 (normal investigative techniques found useless based only on a showing that a bookmaker would not accept bets from people unknown to him). Based on the information before it, the court was fully entitled to "give weight" to the opinion of Detective Gonzalez that in this case it was reasonably unlikely that normal investigative techniques would succeed if tried further. *In Re Dunn*, 507 F.2d 195, 196 (1st Cir. 1975). See also, *United States* v. *Mainello*, 345 F. Supp. 863 (E.D.N.Y. 1972). Appellants' contention is without merit.[15]

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[15] To be discounted is appellants' claim that the applications for extensions of the Fury warrant failed to recite the inutility of other investigative techniques. See N.Y.CPL § 700.40. Both applications for extensions by District Attorney Ferraro incorporated by reference all previous orders and application papers under the Fury order (A. 102, 117). In addition, both applications included additional affidavits by Detective Gonzalez. In paragraph 5 of his affidavit for the first extension, Gonzalez described the furtive actions of Fury and his wife while transporting stolen property (A. 105). And in support of the application for the June 27, 1974, extension, Gonzalez stated that the complex nature of what was now a narcotics and theft conspiracy rendered other investigative measures useless (A. 119-121).

POINT VI

There Was Probable Cause For The First Extension Of The Fury Wiretap.

Appellants claim that the affidavit submitted in support of the application for the the May 28, 1974, extension of the Fury wiretap failed to establish "present" probable cause. Specifically, it is argued that the transcripts of tapes from the tap annexed to the affidavit of Detective Gonzalez reveal only inocuous, or, at best, ambiguous conversations and dealings between Fury and and his associates. We submit that the argument is without merit.

Both the New York eavesdropping law, CPL §§ 700.15, 700.20 and 700.30, and the federal statute, T. 18 U.S.C. §§ 2518(1) and (3), provide that a wiretap may issue only upon a showing of probable cause to believe that communications pertaining to the designated offense will be obtained through the wiretap. And "[p]robable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably truthworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Brinegar* v. *United States*, 338 U.S. 160, 175-176 (1949).[16] Here, an examination of the Gonzalez affidavit fully supports the conclusion that probable cause was established for the first extension order.

We note at the outset that the conversions annexed to the affidavit cannot be considered in isolation. They

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[16] The standard of probable cause for a wiretap warrant is the same as for a regular search warrant. *United States* v. *Falcone*, 505 F.2d 478, 481 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975).

must be viewed in context with (i) Fury's criminal record, *Cameron* v. *Fastoff*, 543 F.2d 971, 976 (2d Cir. 1976), with (ii) what the investigation had already disclosed (as set forth in the Gonzalez affidavit for the initial order) and with (iii) the conversations obtained under the Nassau wiretap. Taken in this setting, and giving proper weight to the conclusions of Detective Gonzalez, *In Re Dunn, supra*, 507 F.2d at 197, it is clear that probable cause was established for the extension order.

For example, based on what was known of Fury and his associates on May 28, 1974, it is ludicrous to suggest, as appellants do, that the first conversation (A. 162) involved a discussion of dinner plates and could not have pertained to license plates for stolen cars, as Gonzalez determined. It was also entirely reasonable for Detective Gonzalez to conclude that conversation three (A. 166-168) ("pants" and "clocks"), conversation five (A. 183-187) (discussion of clocks and fryers; "you make the price"), conversation seven (A. 190-191) ("did you get a price with them? or what"); conversation eight (A. 192-198) (complaints that now somebody had to be found to buy "the whole thing") and conversation nine (A. 199) (reference to "any of those things with eight tract coming out") all involved discussions of stolen property. Furthermore, in conversation four (A. 170-182) Fury was heard to discuss being able to obtain what it was fair to believe were fraudulent automobile registration papers (A. 170-171) and to reassure the party with whom he was talking that there was no danger in coming to see him because he was "ice cold." (A. 172). Finally, the affidavit also set forth the fact that Fury and his wife had been seen furtively moving what appeared to be stolen goods (A. 105).

In short, the affidavit of Detective Gonzalez demonstrated more than sufficient probable cause to believe that evidence of appellant Fury's criminal activities would continue to be obtained over the telephone.

POINT VII

The Tapes From The Fury Wiretap Were Timely Sealed.

Appellants argue that tapes of conversations from the Fury wiretap were not timely sealed pursuant to N.Y. CPL § 700.50(2) (see, Point Three, *supra*). It is alleged, in particular, that it was necessary that the tapes be sealed upon completion of each of the three 30 day periods of the wiretap which resulted from the extension orders. Hence, so the argument goes, there were delays in sealing ranging from between 5 and 63 days. The claim is totally without merit.

During the period between April 29 and July 26, 1974, there was only one single eavesdropping warrant in effect with respect to the Fury telephone. As extended, Justice Dubin's warrant terminated on July 26th, and it was only upon that date that sealing was required. Although there was some few days delay between the termination of the wiretap and Justice Finz's signing of the sealing order on July 31st, Judge Pratt properly found that the authorities complied with the requirements of Section 700.50(a) of the C.P.L. and that the small delay was neither unreasonable nor unexplained (A. 151).

Under the New York law, sealing is required "upon the expiration of the period of an eavesdropping warrant." CPL § 700.50(2). Significantly, the statute uses the phrase "the period" rather than "a period" or "each period." This wording clearly shows an intent to treat an eavesdropping order, together with its extensions, as one continuing period for the purposes of the sealing requirement.[17]

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[17] See also, T. 18 U.S.C. § 2518(8)(a).

Appellants' contention that tapes must be sealed while the eavesdropping warrant continues is contrary to both a plain reading of the statute and basic common sense. Moreover, appellants ~~has~~ have been unable to point to any case authority in support of their proposition that a single eavesdropping operation must be segmented for the purposes of the sealing requirement merely because the original application has been subsequently extended. The cases which are cited are totally distinguishable, in that they all involve entirely separate eavesdropping orders.

In *People* v. *Simmons*, 84 Misc. 2d 749, 378 N.Y.S. 2d 263 (Sup. Ct. N.Y. Cty. 1975), an eavesdropping warrant was signed and executed. Based in part on communications intercepted under that warrant, a second warrant covering a different telephone number used by the defendant was obtained. This warrant was followed by four separate additional wiretap orders authorizing the interception of calls on other telephones. The orders in *Simmons* dealt with different telephone numbers and were, in fact, entirely separate warrants. Similarly, in *United States* v. *Gigante*, *supra*, 538 F.2d 502, this Court had before it separate wiretap orders resulting in the interception of calls on ten different telephones.

The facts of *Simmons* and *Gigante* make them clearly distinguishable from the case at bar. The courts in *Simmons* and *Gigante* held that the separate nature of the different wiretap orders required that each set of tapes be sealed upon completion of the wiretap pursuant to which it was obtained. In this case, however, the wiretap in question was for *one* telephone and for *one* continuing period of time. Hence, a determination of the question of whether the tapes were sealed according to the statutory requirement must focus on the period

from the time that the warrant expired (July 26, 1974) to the date that the sealing order was signed (July 31, 1974).

Section 700.50(2) of the CPL states that tapes must be presented to the issuing judge "immediately upon the expiration of the period of an eavesdropping warrant . . ." This language has been judicially interpreted to mean without unnecessary or unreasonable delay. In *People* v. *Carter*, 81 Misc. 2d 345, 365 N.Y.S. 2d 964 (Sup. Ct. Nassau Cty. 1975), the defendants sought to suppress evidence of conversations intercepted in the course of the execution of three separate eavesdropping warrants. In the case of each warrant, there was an eight day delay between the termination of the warrant and the sealing of tapes of intercepted calls. In support of the motion to suppress, defendants urged that the word "immediately" in the statute be interpreted in accordance with the dictionary definition to mean "without delay." The court denied the motion to suppress, however, and in so doing, construed the word "immediately" in § 700.50(2) to mean without unnecessary or unreasonable delay. *Id.* See also, *People* v. *Blanda*, 80 Misc. 2d 79, 362 N.Y.S. 2d 735, 741 (Sup. Ct. Monroe Cty. 1974). A similar interpretation was made in *People* v. *Simmons*, *supra*: "In view of the statutory exception that a satisfactory explanation excuses the absence of a seal, logic dictates that a sufficient reason for the delay in sealing would likewise permit their use at trial." 84 Misc. 2d at 378 N.Y.S. 2d at 266, citing *United States* v. *Capra*, 501 F.2d 267, 277 n. 10 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975). See CPL § 700.65(3).

In the instant case, it is clear that the tapes from the Fury wiretap were sealed, as Judge Pratt found, without either unnecessary or unreasonable delay. Upon completion of the wiretap, Detective Gonzalez promptly

transported the tapes to the Queens County District Attorney's Office (A. 135), where they were immediately locked in the office vault when it was learned that Justice D bin was not available to sign the sealing order (A. 136). Thereafter, as soon as it was determined that Justice Dubin was away on vacation, the District Attorney's Office presented the sealing order to Justice Finz for his signature (A. 137-139). It can hardly be argued that the above facts show unreasonable or unexplained delay. On the contrary, they show prompt action on the part of both the police and the District Attorney's Office, particularly in view of the absence of Justice Dubin. Moreover, at all times during the period between July 25th and July 31st the tapes were securely maintained in the vault at the District Attorney's Office (A. 139).[18]

Indeed, *United States* v. *Poeta*, *supra*, 455 F.2d 117, disposes of the claim made by appellants. In *Poeta*, there was a thirteen day delay between the termination of the wiretap and the sealing of the tapes. This Court found that the delay in sealing was excusable in view of the fact that the New York Supreme Court Justice who issued the eavesdropping warrant was on vacation when the wiretap ended. Moreover, in *United States* v. *Gigante*, *supra*, the court specifically distinguished the situation in *Poeta*, where there was a satisfactory explanation for the delay in sealing, from the situation before it, where no excuse was offered for the delay. 538 F.2d at 506 n. 8. In this case, the facts clearly support Judge Pratt's finding that the brief period of

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[18] Thus effectively maintaining the security of the evidence. See, *United States* v. *Gigante*, *supra*, 538 F.2d at 506-507.

time between termination of the wiretap and sealing was neither unreasonable nor unexplained.

In conclusion, we respectfully submit that for all of the foregoing reasons, the motion to suppress was properly denied.

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[19] Appellants' reliance on the cases of *People* v. *Nicoletti*, 34 N.Y. 2d 249, 356 N.Y.S. 2d 855, 313 N.E. 2d 336 (1974); *People* v. *Guenther*, 81 Misc. 2d 258, 366 N.Y.S. 2d 306 (City Ct. Monroe Cty. 1975); *People* v. *Simmons*, *supra*, 84 Misc. 2d 749, 376 N.Y.S. 2d 263; and *People* v. *Sher*, *supra*, 38 N.Y. 2d 384 N.Y.S. 2d 843, 345 N.E. 2d 314, is clearly misplaced. In *Nicoletti*, recordings of intercepted conversations were kept in a footlocker. Moreover, during the course of the investigation the District Attorney, accompanied by police officers, reviewed the tapes at the home of the investigating detective. "The Justice who issued the eavesdropping warrant apparently was advised of the storage arrangements for the tape recordings by the District Attorney, but they were never presented to him for sealing and none of them were, in fact, ever sealed." 34 N.Y. 2d at 252, 356 N.Y.S. 2d at 857, 313 N.E. 2d at 338. In *Guenther*, police officers placed the tapes in a gym-type locker contrary to departmental rules, and the tapes remained there for seven days before they were sealed. Moreover, during that seven day period there were no attempts to contact the issuing judge, and no satisfactory reasons were given for the delay. In *Simmons*, delays between the expiration of five different eavesdropping warrants and sealing of recordings ranged from 109 days to 21 days. Finally, in *Sher* the tapes were properly sealed pursuant to a court order; however, the prosecution failed to secure judicial approval before unsealing the tapes prior to trial.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: Brooklyn, New York
January 31, 1977

Respectfully submitted,

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Eastern District of New York.
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Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Joanne Bracco being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 3rd day of February 1977 he served a copy of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

Evseroff & Sonenshine	David W. McCarthy
186 Joralemon Street	1527 Franklin Avenue
Brooklyn, N.Y. 11201	Mineola, N.Y. 11501

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Joanne Bracco

Sworn to before me this

3rd day of February 1977

Carolyn N. Johnson

Notary Public, No. 41-[illegible]
Qualified in [illegible]
Term Expires March 30, 1977